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IN THE

Supreme Court of the United States

October Term 1965

No. 534

JOHN BATTAGLIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Grounds on which the jurisdiction of this court is invoked 2

Questions presented for review 3

Constitutional provisions and statutes involved 4

Statement of facts pertinent to the determination of the petition 5

Reasons for granting the writ and argument amplifying the same 11

I.

Certiorari should be granted to settle the important question, never directly before passed upon by this court, whether the use of evidence obtained by means of an electric transmitting device concealed upon a person entering a private room or home of a defendant was unlawful and violative of the rights of the defendant under the Fourth and Fifth Amendments to the Constitution, and also violative of the Sixth Amendment to the Constitution where it was used to obtain admissions or confessions on the part of the defendant for purposes of prosecution 11

II.

This court should grant certiorari to settle the important question whether the defendant is entitled to inspect any document in the possession of the Government which is used by any Government witness to refresh his recollection preliminary to his testifying at the trial, and whether refusal of the prosecution to permit

Page

Battaglia's attorney to inspect the typewritten transcript from which Williams refreshed his recollection before testifying was not in violation of Title 18, Section 3500, U.S.C. and a denial to petitioner of a fair trial and due process under the Fifth Amendment of the Constitution 18

III.

This court should grant certiorari to settle the important questions as to whether portions of a transcript of testimony given by a defendant before a grand jury can be used for any purpose in the trial of said defendant or his co-defendant, where the witness was not represented by counsel before the grand jury or advised of his constitutional rights, and whether the use of such grand jury testimony is in violation of the Fifth and Sixth Amendments of the Constitution 20

IV.

Certiorari should be granted because the conviction and sentence of petitioner resulted from proceeding and evidence admitted concerning acts and statements of the alleged co-conspirator and co-defendant Tenner subsequent to the time when the conspiracy terminated, which ruling was in conflict with decisions of this court and calls for the exercise of this court's power of supervision 22

Conclusion 26

INDEX TO APPENDICES

Page

Appendix "A". Judgment and Commitment (Rev. 7-52) .....App. p. 1

Appendix "B". Letter to Burton Marks, Esq. re: Judgment affirming conviction 3

Appendix "C". Opinion of the United States Court of Appeals for the Ninth Circuit 4

Appendix "D". Letter to Burton Marks, Esq. re: Order denying Petition for Rehearing 14

Appendix "E". Constitutional Provisions and Statutes Involved 15

TABLE OF AUTHORITIES CITED

Cases	Page
Agnello v. United States, 269 U.S. 20	12
Benson v. People of California, 336 F. 2d 791	16
Chapman v. United States, 365 U.S. 610	12
Escobedo v. Illinois, 375 U.S. 902	14, 17, 21
Green v. United States, 356 U.S. 165	15
Jackson v. United States, 250 F. 2d 897	19
Jencks v. United States, 353 U.S. 657	19
Johnson v. United States, 333 U.S. 10	12
Jones v. United States, 357 U.S. 493	12
Kotteakos v. United States, 328 U.S. 750	23
Krulewitch v. United States, 336 U.S. 440	23, 24, 25
Little v. United States, 93 F. 2d 401	20
Lopez v. United States, 373 U.S. 427	13, 16
Massachusetts, Trustees, etc., 200 F. Supp. 623	19
Massiah v. United States, 374 U.S. 805	14, 15, 17, 21
McDonald v. United States, 335 U.S. 451	12
Montgomery v. United States, 203 F. 2d 887	19
Morris v. United States, 149 Fed. 123	20
On Lee v. U.S., 343 U.S. 747	12, 13, 15
Silverman v. United States, 365 U.S. 505	13, 16
Taylor v. United States, 19 F. 2d 813	20
Taylor v. United States, 286 U.S. 1	12
United States v. Beno, 333 F. 2d 669	16
United States v. M. Craus & Bros., 149 F. 2d 713	20
United States v. Rappy, 157 F. 2d 964	19

Statutes

Page

United States Code, Title 18, Sec. 2 .....1, 2, 4

United States Code, Title 18, Sec. 1343 .....1, 2, 4

United States Code, Title 18, Sec. 3500 .....3, 4, 19

United States Code, Title 28, Sec. 1254 3

United States Code, Title 28, Sec. 1291 3

United States Code, Title 28, Sec. 1294 3

United States Constitution, Fourth Amendment 3, 4
.....11, 12

United States Constitution, Fifth Amendment 3, 4, 11,
.....12, 20, 21, 23

United States Constitution, Sixth Amendment 3, 4, 11,
.....14, 17, 21

Textbook

3 Wigmore on Evidence (3rd Ed.), Sec. 762, p. 108.. 19

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner John Battaglia respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming the judgment in part of the United States District Court for the Southern District of California, following his conviction by a jury on August 19, 1964, on the six counts on the violation of Title 18, Sections 2 and 1343, U.S.C. On September 2, 1964, the District Court rendered its judgment and pronounced sentence against petitioner and against his co-defendant Harold Tenner. Harold Tenner was sentenced to six months, but petitioner was sentenced to five years on each of the six counts, the sentences on Count I, II, III and IV to run consecutively to each other, and the sentence on Counts V and VI to run consecutively to

each other, but concurrently with the sentence imposed on Counts I and II.

From such judgment and sentence Battaglia appealed, but Tenner did not. On the 12th day of July, 1965, the Court of Appeals for the Ninth Circuit affirmed Battaglia's conviction on Counts I and II, but reversed the conviction and sentence on Counts III, IV, V and VI. A Petition for rehearing was duly filed by Battaglia and was denied by the Ninth Circuit Court on August 6, 1965.

A copy of the judgment and sentence is set forth in Appendix "A"; a copy of the judgment affirming the conviction on Counts I and II and reversing the conviction on the remaining counts is set forth as Appendix "B"; a copy of the Circuit Court opinion which is as yet unreported is attached hereto as Appendix "C"; and a copy of the order denying the petition for rehearing is attached hereto as Appendix "D".

Grounds on Which the Jurisdiction of This Court Is Invoked.

The petitioner was convicted for violation of the federal statute for using the wire to defraud through the means of telephone conversations allegedly in violation of Sections 2 and 1343 of Title 18, U.S.C. The judgment and sentence was affirmed by the Circuit Court on July 12, 1965.

The petition for rehearing being timely, was denied on August 6, 1965, by the Ninth Circuit Court. The Circuit Court had jurisdiction under Title 28, Sections

1291 and 1294, and the section under which it is believed that this court has jurisdiction is Section 1254 of Title 28, U.S.C. to review the judgment in question.

Questions Presented for Review.

1. Whether the court erred in permitting Sgt. Thompson of the San Diego Police to testify to a conversation overheard by him through the use of a radio transmitter concealed on the person on Warrens, which conversation took place on March 22, 1963, in the hotel room of petitioner Battaglia, at which time Battaglia, Warrens and one Dave Williams were present. Was not the use of such transmitter in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution?

2. Whether the court's permitting the tape recording of such conversation to be admitted in evidence is in violation of the Fourth, Fifth and Sixth Amendments of the Constitution?

3. Whether the court erred in refusing to require the Government to permit an inspection of the purported typewritten transcript of the tape of the conversation which took place in Battaglia's hotel room aforesaid, from which typewritten transcript Williams testified he refreshed his recollection before testifying. Was not the refusal to permit such inspection in violation of *Title 18, Section 3500* U.S.C. and a denial to petitioner of a fair trial and due process under the Fifth Amendment of the Constitution?

4. Whether the court erred in permitting portions of the transcript of the testimony of Harold Tenner, Battaglia's co-defendant, before the Grand Jury to be read to the jury, and whether this was in violation of the Fifth and Sixth Amendments of the Constitution?

5. Whether the Assistant United States Attorney was guilty of misconduct in his argument to the jury in referring to petitioner as "Johnnie B", and whether the court erred in refusing the request of the attorney for Battaglia to instruct or admonish the jury with respect to such misconduct, was not this a denial to Battaglia of a fair trial and due process as required by the Fifth Amendment of the Constitution?

6. Whether the court erred in admitting against Battaglia, testimony of conversations between Tenner and Warrens and between Tenner and certain Government agents in connection with Counts III, IV, V and VI? The admission of such testimony against Battaglia was highly prejudicial and denied him a fair trial and due process under the Fifth Amendment of the Constitution.

Constitutional Provisions and Statutes Involved.

Defendants were convicted under Section 2 and Section 1343 of Title 18, U.S.C.

Fourth Amendment to the Constitution.

Fifth Amendment to the United States Constitution.

Sixth Amendment to the United States Constitution.

Title 18, Section 3500, U.S.C.

A copy of the aforesaid statutes and constitutional provisions are set forth in Appendix "D".

Statement of Facts Pertinent to the Determination of the Petition.

In January, 1963, the petitioner Battaglia, a resident of Los Angeles, met a Dr. Kenneth Warrens, a dentist in San Diego, at San Diego. Battaglia stated that he understood Warrens had lost considerable money betting on horse racing and that he had a sure way of recouping these losses, but would need $5,000.00 from Warrens to do so.

For several months prior to meeting Battaglia, as well as during some of the time that they were in contact with each other, Warrens had bet heavily with bookmakers, or supposed bookmakers, some of whom he never saw again, and had lost heavily. On the stand, he also admitted that "with the two other bookies" (description given by the witness) he was working with the scheme of the invisible ink and bet "to cheat other bookies" and to cheat the owners of the Agua Caliente race track, and that he was willing to do anything to get money, honestly or dishonestly [R. T. 114-115, 117, 120, 122].

At the meeting Battaglia said that sure-fire bets could be placed on horse races already run, so later Warrens gave him $5,000.00 to make bets on a horse race already run. In the latter part of January, a man claiming to be Harry Mellon (later identified as Harold Tenner) called Warrens from Las Vegas stating that he was recognizing a deposit of $15,000.00, and that Warrens would have an account symbol of JWS. On February 5, pursuant to previous directions by Battaglia, Warrens called Las Vegas from a phone booth at San Diego and at 4:00 o'clock on the same day Battaglia called Warrens at the same place telling him

that they would be going on the seventh at Santa Anita and that the winning horse number was 215, post position 2. Warrens then called the Las Vegas number and left a call for Mellon. After reaching him, Warrens stated that he wanted to place a $15,000.00 bet on Rabellaro. The next day Battaglia called Warrens and said the horse did not win.

Later in February, Battaglia told Warrens that "Doug" would probably do the betting once more, but that the bet should be $20,000.00 to insure recovery of the previous loss, with each one of them to put up $10,000.00. Warrens claimed to have put up $10,000.00 first, and then an additional $4,000.00.

Warrens came to Los Angeles on March 11th, met Battaglia and they went to Burbank, a suburb of Los Angeles. There they located two phone booths side by side. They placed calls simultaneously to the Las Vegas number, purportedly to Harry Mellon. A call was returned and Warrens told the man at the other end of the line to bet $20,000.00. Ten minutes later a call came to Warrens and the voice of Mellon said, "JWS, the horse came in out of the money".

The next day Battaglia called Warrens and said Mellon was able to change the bet, but the only way to get him paid off was to change the bet to $30,000.00, and this had to be on deposit before the bookmaker would honor the bet. Warrens arranged with a friend, Dave Williams, to get $9,000.00 additional to Battaglia. Warrens agreed to repay Williams the money within a

few days, stating that the money was on deposit with a bookmaker and he would have to wait for the return. Later Mellon called Warrens in San Diego and said that he would see Warrens the following Monday, but he never showed up.

On March 22, Williams went to San Diego to collect his loan and talked to Warrens. The two of them then went to the San Diego Police where they told their story. Sgt. Thompson of the San Diego police then equipped Warrens with a transmitting device, hidden on his person and Warrens and Williams went to call upon Battaglia at his motel room at the Town and Country Motel in San Diego. Sgt. Thompson followed in a truck with recording equipment to pick up the transmission from the hidden trasmitter. Williams testified that they went to try to trap Battaglia into making admissions [R. T. 299].

Sgt. Thompson, some distance away in the equipment truck listened to and caused to be recorded on a tape [Ex. 1] the conversation, which took place in the motel room of Battaglia, between Battaglia, Williams and Warrens. Over objection of Battaglia, Sgt. Thompson was permitted to testify as to what he overheard [R. T. 274-299]. The tape recording of the conversation was also admitted over objection of defendants in evidence. Portions of the tape were unintelligible due to static and other interferences. A considerable part of Battaglia's statements were not sufficiently audible to be understood [R. T. 79-81, 86, 87].

Later in the day, Warrens called Battaglia and this conversation was taped through a recording device attached to the telephone. In the conversation, Battaglia stated that he had hopes of getting back Warrens' money. Twice the week following March 22nd, Battaglia called to reassure Warrens. Battaglia had been interested in some business propositions one of which was development of a sky-shooter (a small helicopter), and the other with a certain ranch known as the Bar-H Ranch. While Battaglia did not take the stand, Williams and Warrens testified that Battaglia had discussed with Warrens the possibility of getting money to finance the two projects. On the 27th of March, Warrens mailed back to Battaglia the Articles of Incorporation of Sky-Shooter, Inc. Thereafter there were no telephone calls or other communications between Battaglia and Warrens.

However, in between May 27th and June 3, 1965, Mellon (Harold Tenner), the co-defendant of Battaglia, called Warrens from Reno, Nevada, to attempt to have Warrens advance him $2,000 to bet on horses. During the conversations he told Warrens not to say anything to John Battaglia. The four telephone conversations which Tenner, alias Mellon, had with Warrens were the basis of Counts III, IV, V, and VI. There was no evidence whatever connecting Battaglia with such counts, and hence the reversal by the Ninth Circuit of Battaglia's conviction on said counts. Objection was made repeatedly by Battaglia's counsel as to the admis-

sion of evidence with respect to said counts and to conversations between the FBI and other Government agents and Tenner, as well as to the testimony of Warrens as to telephone conversations with Tenner. The admission of this testimony against Battaglia was highly prejudicial.

Prior to the trial, the Government made a purported transcript of the tape recording of the conversations obtained through the use of the transmitting device. The day before the trial, Williams, who was the principal witness as to the conversation which took place on March 22nd in Battaglia's hotel room, was permitted to refresh his recollection from the typewritten transcript made by the Government. Since Williams' testimony was in conflict with Sgt. Thompson's testimony as to the conversation which took place, Battaglia's counsel demanded the inspection of the typewritten transcript, but the Government refused this demand and the Government's objection was sustained [R. T. 329-330].

At the trial, the defendant Tenner took the stand and testified on his own behalf and on behalf of Battaglia [R. T. 611-649]. His testimony was, on the whole, quite favorable to Battaglia. Some of it tended to absolve Battaglia not only in connection with Counts III, IV, V, and VI, but also to a certain extent it cleared him of charges under Counts I and II. The Government then in order to impeach Tenner, produced in evidence over objection by Battaglia's counsel, as well as Tenner's counsel, a portion of the transcript

of Tenner's testimony before the Grand Jury, which indicted the two of them [R. T. 632-649]. The testimony of Tenner before the Grand Jury was somewhat in conflict with his testimony on the stand at the trial. A motion to strike the portion of the transcript of Tenner's testimony before the Grand Jury was denied [R. T. 643-649].

When Tenner appeared before the Grand Jury he was not represented by an attorney. Prior to the time he entered the Grand Jury room he did not know that he was a potential defendant in the case, nor was he informed of his constitutional rights. On the stand Tenner admitted that what he testified to before the Grand Jury room was not correct, not that he was scared due to the fact that he was trying to be a bookmaker and solicit in Las Vegas or Nevada without a license. In the Grand Jury room Mr. Tenner began by claiming the Fifth Amendment when he was asked if he knew Harry Mellon, and then subsequently after various warnings made by the Assistant United States Attorney, concerning perjury and the powers of the Grand July, he denied that he was Harry Mellon.[1]

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[1]The portion of the testimony before the Grand Jury which was read over objection and concerning which the motion to strike was denied is found in the Reporter's Transcript pp. 634, 635, 636, 642.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

Certiorari Should Be Granted to Settle the Important Question, Never Directly Before Passed Upon by This Court, Whether the Use of Evidence Obtained by Means of an Electric Transmitting Device Concealed Upon a Person Entering a Private Room or Home of a Defendant Was Unlawful and Violative of the Rights of the Defendant Under the Fourth and Fifth Amendments to the Constitution, and Also Violative of the Sixth Amendment to the Constitution Where It Was Used to Obtain Admissions or Confessions on the Part of the Defendant for Purposes of Prosecution.

The use of such a transmitter was in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The evidence given by Sgt. Thompson was important to the Government's case, as was indicated by the United States Attorney in calling attention to the fact that it corroborated the testimony of Williams and Warrens.

Warrens and Williams went to the San Diego Police Department on March 22, after a conversation between themselves and pictures were shown to them by the officers of Battaglia. It was then arranged by the police that Warrens would be equipped with a recording device being in the nature of a hidden transmitter concealed upon his person, that Warrens was to go to Battaglia's hotel room at the Town and Country Motel in San Diego, together with Williams. They went to the room of Battaglia [R. T. 62-63; 343, 344]: Sgt. Thompson followed in another vehicle containing a de-

vice for receiving the transmitted conversation [R. T. 63]. Sgt. Thompson's car was parked a short distance from the hotel room equipped with a transmitting and receiving device. He was able to make a recorded tape of the conversation between Warrens, Williams and Battaglia, but he also plugged into the receiving device and was able to listen to the conversation [R. T. 76-81, 274], They of course were able to obtain admittance to Battaglia's room by reason of their acquaintanceship and dealings. Officer Thompson was permitted, over objection, to testify as to what he heard [R. T. 276-281]. We contend this was violative of Battaglia's constitutional rights. The Fourth and Fifth Amendments to the United States Constitution have long safeguarded a person's home from invasion by government officials, unless such transgressions were justified by a search warrant supported by probable cause an effected arrest and an incident search or consent of the homeowner. There was no such justification in this case.

See:

Agnello v. United States, 269 U.S. 20 (1925);
Taylor v. United States, 286 U.S. 1 (1932);
Johnson v. United States, 333 U.S. 10 (1948);
McDonald v. United States, 335 U.S. 451 (1948);
Jones v. United States, 357 U.S. 493 (1958);
Chapman v. United States, 365 U.S. 610 (1960).

We contend that *On Lee v. U.S.,* 343 U.S. 747, is no longer authority for the invasion of a man's room by a friend or acquaintance equipped with an electronic transmitting device, and that this case affords an opportunity for the court to once and for all end any dispute about the right of a Government agent to enter a

man's home (in this case his home away from home, a motel room). It was a private room of Battaglia's and there is clearly a distinction between recording a conversation on a person who enters a public establishment with a hidden transmitter and one who enters a person's private room or home under the cloak of a visit or business conversation. In the Solicitor General's brief in *On Lee, supra,* at page 29 thereof, it said this:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publish conversations within a private home are unrelated to the present case. As has been observed above, a private home is not involved; the conversation took place in a place to which the public was invited."

Silverman v. United States, 365 U.S. 505, indicates clearly that the court does not approve of the conduct complained of in this case. In *Silverman, supra,* the court held the evidence was inadmissible under the Fourth Amendment. A specific device used was a "spike mike" driven into the outer wall of Silverman's apartment, by which with the use of the electronic device, agents outside his apartment could hear conversations taking place therein.

Lopez v. United States, 373 U.S. 427 (May, 1963), indicates that *On Lee* is no longer authority for the use of equipment like that in this case. We direct the court's attention to Chief Justice Warren's opinion concurring with the majority, where he said:

> "Since I agree with Mr. Justice Brennan that the *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different

from those stated in the dissent, I have concurred specially. I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a grave danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments."

We strongly urge the court to render an opinion in this case in which the use of hidden electronic devices may be prohibited.

Subsidiary to this point, namely the use of electronic transmitting devices placed upon a person known to the person under investigation comes the proposition of whether or not the rules as laid down in *Escobedo v. Illinois,* 375 U.S. 902 and *Massiah v. United States,* 374 U.S. 805 are not controlling. In *Escobedo, supra,* the petitioner made incriminating statements while being interrogated by officers without an attorney present, and this was held to be in violation of his constitutional rights under the Sixth Amendment. (In the instant case the officers had equipped the man with a transmitting device, he had been sent to Battaglia's room in the hotel, and they had been informed apparently as to what questions they were to put to Battaglia.) The officer himself might as well have been in the room questioning Battaglia. In *Escobedo* the court stated in effect there was no distinction between interrogation before and after the indictment. The court stated:

"We hold only that when the process shifts from investigatory to accusatory—when it focuses on the accused, when its purpose is to elicit a con-

> fession—our adversary system begins to operate, and under the circumstances here the accused must be permitted to consult with his lawyer."

In the case at bar Battaglia, the investigatory process had actually been passed. As just pointed out, the men who went to Battaglia's room were equipped with the transmitting device; they had talked with the police; arrangements had been made then and there to trap Battaglia. The investigation was practically over; they were now at the accusatory stage seeking information and admissions from him which would convict him. Battaglia was by now a prime suspect and attention had focused upon him. Such conduct was condemned in *Massiah v. United States, supra.*

In closing this point, may we quote Mr. Justice Douglas as he importuned in his dissent in *On Lee, supra;*

> "The nature of the instrument that science or engineering develops is not important. A controlling, the decisive factor, is the invasion of privacy against the command of the Fourth and Fifth Amendments."

We realize that the courts sometimes are reluctant to digress from prior decisions and prior practice, but we believe that this case is an appropriate one. As was said in *Green v. United States,* 356 U.S. 165, at 195, in the dissenting opinion:

> "Ordinarily it is sound policy to adhere to prior decisions, but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency they too can profit from trial and error. from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has

never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated re-affirmation. See *Erie vs. Thompkins,* 304 U. S. 64; *Graves vs New York,* 306 U.S. 466, *Nye vs United States,* 313 U. S. 33, where it was said:

'I am quite willing that it be regarded hereafter as a law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported (quoting Chief Justice Taney in the passenger cases, 7 How. 283, 12 L.Ed. 781). Indeed, the court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents.'"

In the instant case, the Circuit Court ruled that it was not error nor a violation of the constitutional rights of Battaglia to permit Sgt. Thompson to testify to the conversation overheard through the transmitting device. In support of its ruling, the court cited its own case of *Benson v. People of California,* 336 F. 2d 791 (9th Cir. 1964), as well as *United States v. Beno,* 333 F. 2d 669 (2nd Cir. 1964). It entirely disregarded the effect and language in the *Silverman* and *Lopez* decisions of this court. We submit that the decision in the instant case and in the cited decisions aforesaid are in conflict with the *Silverman* and *Lopez* decisions

and that this conflict should be resolved and the question settled, since it is an important question of law which affects the use of such devices by law enforcement officers. Moreover, the settlement of such question is important for the guidance of lower courts as well as to resolve the conflicts now existing.

In the instant case, the Circuit Court also ruled against the contentions of Battaglia that the admission of the evidence of Sgt. Thompson and of the tape recording of the transmitted conversation was in violation of the Sixth Amendment under the *Escobedo* and *Massiah* cases on the theory that Battaglia was neither in custody or under indictment, but was still participating in the criminal activity for which he was subsequently indicted. These statements are not consistent with the facts as pointed out above, nor are they consistent with the court's own ruling, in which it held that the unlawful association or conspiracy between Battaglia and his co-defendant Tenner "had been accomplished at least two months before the acts and statements embraced in Counts Three to Six occurred, and in which Tenner, alone, participated."

The alleged conspiracy between Battaglia and Tenner had terminated some time prior to the March 22nd occurrence, and hence there was no further criminal participation by Battaglia and there was no further investigatory process since it had reached the accusatory stage as shown that with the cooperation of the police, Williams and Warrens went to call upon Battaglia for the purpose of trapping him into making admissions [R. T. 299].

We submit therefore that this case falls directly within purview of the *Escobedo* and *Massiah* cases.

II.

This Court Should Grant Certiorari to Settle the Important Question Whether the Defendant Is Entitled to Inspect Any Document in the Possession of the Government Which Is Used by Any Government Witness to Refresh His Recollection Preliminary to His Testifying at the Trial, and Whether Refusal of the Prosecution to Permit Battaglia's Attorney to Inspect the Typewritten Transcript From Which Williams Refreshed His Recollection Before Testifying Was Not in Violation of Title 18, Section 3500, U.S.C. and a Denial to Petitioner of a Fair Trial and Due Process Under the Fifth Amendment of the Constitution.

In this instant case, as pointed out *supra,* a tape recording was made of the transmission of the conversations between Williams, Warrens and Battaglia. This tape recording, while introduced in part in evidence, was purportedly reduced to a typewritten transcript by the Government. Portions of the tape, especially with respect to statements made by Battaglia, were indistinguishable. Williams was permitted to refresh his recollection from the typewritten transcript just before testifying. Since his testimony was somewhat in conflict with that of Sgt. Thompson and of Warrens, the typewritten transcript from which he refreshed his recollection became very important. Nevertheless the Government, upon demand of Battaglia's counsel, refused to permit such inspection and the trial court sustained the Government's position. Its refusal to permit such inspection raises an inference that the typewritten transcript was not in accordance with the tape recording, and that gaps in the tape recording may have been filled in on the transcript.

The Circuit Court held that such denial was not in violation of *18 U.S.C., Section 3500* (the Jencks Act), because it was not a written statement made by the witness and signed or otherwise adopted or approved by him, or made to an agent of the Government.

We respectfully disagree with the holding, since Williams participated in the conversation from which the transcript of the tape recording was made, and hence, the statement, insofar as anything said by him was concerned, was his statement. The instant case comes within the rule laid down in the case *Jencks v. United States,* 353 U.S. 657. This Court in an exhaustive decision held that the statements of any Government witnesses must be produced, since the impeachment of their testimony is singularly important to the defendant, and that the failure to produce such statements or reports necessitates dismissal of the case.

In the case of *Jackson v. United States,* 250 F. 2d 897, it was held that where a witness has used a paper to refresh his recollection, the opposing side upon proper demand may examine the paper and use it for cross-examination. (*Montgomery v. United States,* 203 F. 2d 887; *United States v. Rappy,* 157 F. 2d 964.)

In the petition of *Massachusetts, Trustees, Etc.,* 200 F. Supp. 623, the court held that if a witness refreshes his recollection before taking the stand *from any document,* the cross-examiner is entitled to inspect so much thereof as bears directly upon the testimony given, whether it supports or contradicts such testimony.

In *Wigmore on Evidence,* 3rd Ed., Vol. 3, Section 762, page 108, the rule is stated that while a witness may refresh his recollection from a writing not prepared

by himself, if the opponent asks to see the writing and to cross-examine from it, his request must be granted. The purpose of the rule as stated by Wigmore is to avoid imposition and false aids. A number of cases have been cited in support of such rule:

Morris v. United States, 149 Fed. 123;

Taylor v. United States, 19 F. 2d 813;

Little v. United States, 93 F. 2d 401;

United States v. M. Craus & Bros., 149 F. 2d 713.

We submit that this court should grant certiorari, not only to determine whether in this case the use of the typewritten transcript was in violation of the Jencks Act, but whether denial of such inspection was a denial of due process under the Fifth Amendment of the Constitution.

III.

This Court Should Grant Certiorari to Settle the Important Questions as to Whether Portions of a Transcript of Testimony Given by a Defendant Before a Grand Jury Can Be Used for Any Purpose in the Trial of Said Defendant or His Co-Defendant, Where the Witness Was Not Represented by Counsel Before the Grand Jury or Advised of His Constitutional Rights, and Whether the Use of Such Grand Jury Testimony Is in Violation of the Fifth and Sixth Amendments of the Constitution.

In the instant case, Tenner, Battaglia's co-defendant, was called before the grand jury prior to the indictment and was not represented by counsel nor advised of his constitutional rights. Further, after Tenner first claimed the Fifth Amendment, he was advised or warned

by the United States Attorney, or even impliedly threatened, as follows:

> "I would warn you, Mr. Tenner, you are appearing before a grand jury, a grand jury appointed and selected by the law, by proper authorities in the Southern District of California."

After other statements as to the power of the grand jury made by U. S. Attorney, Tenner apparently did not stand upon the Fifth Amendment.

At the trial, Tenner took the stand and testified on behalf of himself and on behalf of Battaglia. The grand jury transcript then permitted to be read to the jury over objections of counsel [R. T. 631-642], impeached some of the testimony given by Tenner upon the stand. A motion to strike the testimony so read to the grand jury was denied [R. T. 667-672].

We submit that the use of such transcript was in violation of the rules of the *Massiah* and *Escobedo* cases, that this important question has never been passed upon with reference to testimony given by a prospective defendant before a grand jury. This court should therefore settle such important question as to whether testimony given by a prospective defendant before a grand jury when he is not represented by counsel is violative of the Fifth and Sixth Amendments of the United States Constitution, especially since at this time witnesses are not generally permitted to be represented by counsel at grand jury hearings.

IV.

Certiorari Should Be Granted Because the Conviction and Sentence of Petitioner Resulted From Proceeding and Evidence Admitted Concerning Acts and Statements of the Alleged Co-Conspirator and Co-Defendant Tenner Subsequent to the Time When the Conspiracy Terminated, Which Ruling Was in Conflict With Decisions of This Court and Calls for the Exercise of This Court's Power of Supervision.

Count I alleged as a basis for the indictment a wire fraud allegedly committed by the defendants on February 5, 1963, and sets forth nine overt acts, the last being that the defendant Harry Mellon requested $2,000 that would be wagered on a sure horse race. Count II makes the same allegations except in addition it alleged a telephone call made on March 11, 1963, from Burbank, in Los Angeles County to Las Vegas, Nevada. The remaining four counts had to do only with telephone conversations between the defendant Tenner and Warrens between May 27th and June 3, 1963. The evidence clearly showed that the alleged conspiracy, if any, between Tenner and Battaglia terminated with the incident on March 11th, and subsequent to March 27th there were no further communications or contacts between Battaglia and Warrens. There was thus no evidence to show any conspiracy between Battaglia and Tenner subsequent to said date, and the Circuit Court rightfully ruled that the conviction of Battaglia on Counts III through VI inclusive should be reversed for insufficiency of the evidence.

However, the trial court, over objection of counsel for Battaglia, permitted the introduction of evidence

concerning telephone and other conversations and acts of Tenner in the latter part of May and the early part of June, 1963. Some of the conversations took place between Tenner and FBI and other government agents. It also included statements made by Tenner before the grand jury at a much later date.

We submit that the admission of such evidence was highly prejudicial to Battaglia and denied him a fair trial and due process as required by the Fifth Amendment of the Constitution. With respect to such question the decision of the Circuit Court is in conflict with decisions of this court, notably *Kotteakos v. United States,* 328 U. S. 750, and *Krulewitch v. United States,* 336 U. S. 440. In the *Kotteakos* case this court condemned charges of multiple conspiracies and the proof of a group of single conspiracies under a charge of a one general conspiracy. In that case, there were eight different conspiracies of the same sort through a common key figure, one Simon Brown, and a large number of defendants. Only seven were convicted including petitioners. The Court stated, on page 764:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and judgment should stand, *except perhaps where the departure is from a constitutional norm,* or a specific command of Congress. . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (Emphasis added.)

This court reversed the conviction of Kotteakos by reason of such multiple conspiracy charges.

In the instant case, the charges of conspiracy for the additional four counts was unwarranted, since the only evidence of a conspiracy involving Battaglia pertained to the first two counts only.

In the *Krulewitch* case the conviction of the petitioner for conspiracy was reversed, because the declarations and statements of a co-conspirator admitted into evidence, were made some time after the conspiracy had terminated or ended in failure. The Government contended that an implicit subsidiary phase of conspiracy survived which had concealment as its principal objective. The Circuit Court adopted this view, but the Supreme Court rejected the same, holding that statements made in furtherance of a going conspiracy are admissible, but not those made after the conspiracy ended.

Mr. Justice Jackson in his concurring opinion, page 445, stated:

> "In unavailing protest of the courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that this loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

He further stated, on page 453:

> "As a practical matter, the accused is confronted with a hodge-podge of acts and statements by others which he may never have authorized or in-

> tended or even thought about, but which helped to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."

In the instant case, the trial court permitted over objection of Batagglia's attorney almost 20 Government witnesses to testify as to acts, statements and conversations had by or with Tenner from May 27th and thereafter, more than 2 months after the termination of the alleged conspiracy to violate the Wire Fraud Act as set forth in the first two counts. The prejudicial effect of the testimony of this imposing array of Government witnesses cannot be under-estimated, and undoubtedly resulted in the conviction of Battaglia, not only on the first two counts but on the remaining four counts concerning which there was no evidence against him.

The statements made by Tenner before the grand jury fall in the category and are governed by the rule that declarations or statements made by an alleged co-conspirator are not admissible if made subsequent to the termination of the conspiracy (*Krulewitch v. United States, supra*). Because of this prejudicial effect, we submit that this court in the exercise of its power of supervision should reverse the conviction of Battaglia on the two counts for which he now stands convicted. (There being no appeal on the part of the Government from the reversal by the Circuit Court on the last four counts.)

Conclusion.

In light of all of the above and foregoing, we respectfully request this court to issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner.

APPENDIX "A".

Judgment and Commitment (Rev. 7-52).

United States District Court for the Southern District of California, Central Division.

United States of America v. John L. Battaglia. No. 32918-Criminal.

On this 2nd day of September, 1964 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of knowingly and wilfully transmitting and causing to be transmitted by wire, certain telephone calls for the purpose of executing schemes of fraud in violation of Title 18, United States Code, Sections 1343 and 2 as charged in Counts 1, 2, 3, 4, 5 and 6 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years as to each of Counts 1, 2, 3, 4, 5 and 6; sentence as to Counts 1, 2, 3 and 4 to run Con-

secutively; sentence as to Counts 5 and 6 to run Consecutively with each other and Concurrently with the sentence imposed in Counts 1 and 2.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roger D. Foley, Jr.
United States District Judge.
Edward R. Davis, Deputy Clerk.

The Court recommends commitment to:

John A. Childress, Clerk
Filed: September 2, 1964.

APPENDIX "B".

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, Calif. 94101

July 12, 1965

Burton Marks, Esq.
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

In case No. 19513 Battaglia vs. U.S.A. an opinion was this day filed, in accordance with which a Judgment was filed and entered affirming in part, reversing in part, and remanding, etc. judgment of the Court below.

Pursuant to Rule 26, and unless the judgment is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a certified copy of the judgment of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

APPENDIX "C".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John L. Battaglia, Appellant, vs. United States of America, Appellee. No. 19,513.

[July 12, 1965]

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Hamley and Jertberg, Circuit Judges, and Jameson, District Judge.

Jertberg, Circuit Judge:

Following trial to a jury, appellant and his codefendant, Harold Tenner, were convicted on all six counts of an indictment charging violation of Title 18 U.S.C.A. §§2, and 1343.[1] Tenner did not appeal.

This court's jurisdiction over the appeal is based upon 18 U.S.C.A. §§1291 and 1294(1).

---

[1]"§2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"§1343. *Fraud by wire, radio, or television*

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Count One of the indictment in substance charges that beginning on or about January 15, 1963, and continuing until on or about June 7, 1963, John L. Battaglia (hereafter appellant) and Harold Tenner devised and intended to devise a scheme and artifice to defraud and to obtain money from John Kenneth Warrens (hereafter Warrens) by means of false and fraudulent pretenses, representations and promises; said scheme consisted of fraudulent representations concerning a past-posting scheme whereby Warrens would place wagers through appellant and Tenner with bookmakers in Las Vegas on horse races that had been completed; that Warrens was induced to pay over monies to appellant and Tenner by means of the false and fraudulent representations and promises which those charged well knew were false and fraudulent, and which schemes are set forth in Count One. Count One also alleges that on or about February 5, 1963, those charged, for the purpose of executing the scheme, transmitted and caused to be transmitted by means of wire, a telephone call from San Diego, California, to Las Vegas, Nevada.

Count Two realleges the allegations of Count One except the last mentioned communication by wire, and alleges that on or about March 11, 1963, those charged transmitted and caused to be transmitted by means of wire, a telephone call, from Burbank, California, to Las Vegas, Nevada.

We shall first consider appellant's contention that the evidence was insufficient to sustain convictions of appellant on Counts One and Two.

The evidence relating to Counts One and Two reflects the following: Warrens was approached by appellant in January, 1963. Appellant told him that he had certain

contacts at a Las Vegas bookmaker's office and at a race track which enabled him to place bets on a horse after it had won the race, and that he needed Warrens' participation because he was without sufficient funds and was unable to place bets in his own name. Warrens agreed to participate and delivered $5,000 to appellant and was told an employee of a Las Vegas bookmaker, "Harry Mellon", would be calling to confirm the deposit. "Harry Mellon" was in reality a Las Vegas home improvement salesman named Harold Tenner. Tenner telephoned Warrens from Las Vegas, confirmed the deposit, and told Warrens he was to call a certain telephone number in Las Vegas when he wished to place a bet. The number was that of the T & B Sales Company which was owned by Tenner. Later, after appellant had informed Warrens of the bet to place, Warrens telephoned Tenner and placed the bet. The horse lost. This procedure was repeated a second time in a similar fashion, Warrens hoping thereby to recoup his previous loss. This time he lost $14,000. At appellant's urging Warrens agreed to place still another bet and borrowed $9,000 from a friend, Williams, for this purpose, which amount was delivered to appellant by Williams. About a week later, and on March 22, 1963, Williams learned of Warrens previous bets and believing that Warrens was being "conned", induced Warrens to make a report to the San Diego police. On the same day, Williams and Warrens proceeded to the San Diego police station where they identified pictures of appellant, and Warrens told police officers that he had an appointment arranged for that afternoon with appellant at appellant's motel. The police officers equipped Warrens with an electronic transmitter which would broadcast to receiv-

ing and recording equipment that had been installed in a police truck. At the meeting in appellant's motel room, appellant discussed with Warrens and Williams the "past-posting" scheme and the three bets. This conversation was overheard and recorded by police officers in the nearby police truck, and testified to by Officer Thompson.

The following week appellant phoned several times to Warrens to reassure him with respect to the return of his money. No evidence was introduced of any further telephone conversations or other conversations or contact between appellant and Warrens.

Appellant argues that there is nothing in the record to establish that the money furnished by Warrens was not, in fact, bet and lost, and that there is evidence in the record that Warrens furnished the money to appellant in connection with a business transaction. In an interview between an F.B.I. agent and appellant, at which time counsel for appellant was present, appellant stated that neither he nor anyone else on his behalf had ever gambled with Warrens' money.

When viewed in the light most favorable to sustain the verdict, *Glasser v. United States,* 315 U.S. 60 (1942); *Mickelson v. United States,* ..... F.2d ..... (9th Cir. 1965), we find ample evidence upon which the jury could properly return verdicts of guilty as to Counts One and Two.

Appellant next contends it was error and a violation of his constitutional rights for the District Court to permit, over objection, Officer Thompson to testify as to the conversation which took place between Warrens,

Williams and appellant, which he overheard while recording the conversation while in the nearby police truck.

All of the authorities cited by appellant in support of his contention have previously been considered by us at some length in regard to similar contentions made in *Benson v. People of California,* 336 F.2d 791 (9th Cir. 1964), C.D. 380 U.S. 951 (1965). We adhere to what we there said and, accordingly, find no error. See, *United States v. Beno,* 333 F.2d 669 (2d Cir. 1964).

Appellant further objects to the admission of this evidence in reliance upon *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Massiah v. United States,* 377 U.S. 201 (1964), on the ground that no attorney for appellant was present at the time the conversation took place.

In *Escobedo,* the admissions were made while the defendant was under arrest and although his attorney was in an adjoining room of the police station, each was denied access to the other. In *Massiah,* the statements were obtained during the inquisitorial stage of the proceedings after the defendant had been indicted and in the absence of his retained attorney. Here, on the other hand, appellant was neither in custody nor under indictment. Instead, he was still participating in the criminal activity for which he was subsequently indicted. "One is not entitled to counsel while committing the crime . . .". *Grier, et al. v. United States,* ..... F.2d ..... (9th Cir. 1965). See, *United States v. Beno, supra.*

Appellant argues that it was error to admit into evidence a tape recording of the telephone conversation between appellant and Warrens which was obtained with the consent of Warrens by means of an induction coil

attached to his telephone. It is argued that its admission into evidence was in violation of Sec. 605 of the Federal Communications Act, 47 U.S.C.A. 2.[2]

Sec. 605, however, is not applicable if a communication is monitored, as this was, with the consent of one of the communicating parties. *Rathbun v. United States,* 355 U.S. 107 (1957); *Lindsey v. United States,* 332 F.2d 688 (9th Cir. 1964); *United States v. Campbell,* 337 F.2d 396 (7th Cir. 1964).

Appellant's distinction that this means of recording the conversation by use of an induction coil takes the case out of the *Rathbun, supra,* context is not valid for the mechanical nature of the method of overhearing of the conversation is not critical. *Carbo v. United States,* 314 F.2d 718, 739 (9th Cir. 1963).

Appellant's contention that the recording of the conversation without advance notice to appellant and without the use of a tonewarning device as required by an order of the Federal Communications Commission is answered by *Ferguson v. United States,* 307 F.2d 787 (10th Cir. 1962), Opinion withdrawn on other grounds, 329 F.2d 923 (10th Cir. 1964). There the court said at p. 790:

> "* * * a regulation or order directed to the carriers over whom the Federal Communications Commission has jurisdiction, 47 U.S.C.A. §152, cannot

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[2]"Section 605 states in pertinent part:

"* * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *."

be viewed as creating a new crime prohibited to the citizenry nor as changing the rules of evidence evolved in the federal courts."

On cross-examination of Williams, a prosecution witness, who testified on direct examination to the conversations which occurred at appellant's motel room on March 22, 1963, counsel for appellant inquired if the witness had listened to the tape recording of the conversation. The witness replied that he had, several months prior to the trial. Williams also stated that he had also refreshed his memory from a typed transcript of a portion of the tape on the day before the trial. Counsel for appellant requested to inspect the transcript. Such request was denied by the District Court on the ground that defense counsel "has had an opportunity on two occasions to hear the tape recording in full." The record supports the District Court's statement. Appellant contends that the denial to inspect said transcript was in violation of 18 U.S.C. §3500—the Jencks Act. We believe that the transcript does not come within the purview of the Jencks Act since it was not a written statement made by the witness and signed or otherwise adopted or approved by him, made to an agent of the government; or a stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Apart from the Jencks Act, the denial of such inspection, if error, is harmless error when viewed in the light of the entire record.

Co-defendant Tenner testified on his own behalf. Some of the testimony given was in conflict with his

testimony before the Grand Jury. On cross-examination, over the objection of counsel for appellant, Government counsel was permitted to read portions of the Grand Jury transcript to impeach Tenner.

Appellant contends that Tenner's constitutional rights were violated because Tenner testified that he was not represented by an attorney before the Grand Jury nor did he consult with an attorney prior to going before the Grand Jury. Appellant relies upon *Massiah v. United States, supra,* and *Escobedo v. Illinois, supra.* We see no violation of appellant's constitutional rights in connection with the efforts of the Government to impeach the credibility of Tenner.

Finally, appellant contends that the Government counsel was guilty of misconduct in two particulars in his opening and closing arguments to the jury, and that the court erred in the giving and refusal of certain instructions. We believe that the remarks of Government counsel in his arguments to the jury were within the area of fair comment. In connection with appellant's assignment as to instructions, we note that appellant has neither set out the questioned jury instructions nor has he specified his objection in the trial court. There is a complete failure on the part of appellant to comply with the provisions of Rule 18 (2) (d) of the Rules of this Court which provide, in pertinent part, as follows:

> ". . . When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial."

The judgments of conviction of appellant as to Counts One and Two are affirmed.

We agree with the appellant that the evidence is insufficient to support the verdict of guilty as to Counts Three, Four, Five and Six. Count Three of the indictment reads as follows:

"COUNT THREE

[18 USC, §§ 1343 and 2]

"The Grand Jury realleges all of the allegations in Count One of this indictment except those contained in the last paragraph thereof.

"On or about May 27, 1963, at approximately 10:00 A.M., the defendants JOHN L. BATTAGLIA and HAROLD TENNER, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, transmitted and caused to be transmitted by means of wire, a telephone call, from Reno, Nevada to San Diego, in San Diego County, within the Southern Division of the Southern District of California."

Counts Four, Five and Six are the same as Count Three except that the dates of the offenses alleged are May 27, 1963, May 29, 1963, and June 3, 1963, respectively.

There is no dispute that the telephone call on May 27, 1963, referred to in Count Three; the telephone call on May 27, 1963, referred to in Count Four; the telephone call on May 29, 1963, referred to in Count Five; and the telephone call on June 3, 1963, referred to in Count Six were between Tenner and Warrens. The Government concedes that there is no evidence in the

record of contacts or communications between appellant and Warrens after the last week of March, 1963, but contends that since the evidence is sufficient to sustain the convictions of appellant and Tenner under Counts One and Two, the acts and statements of Tenner, referred to in Counts Three through Six, are binding upon appellant in the absence of evidence of some affirmative act on the part of appellant disassociating himself from the scheme to defraud, mentioned in Counts One and Two. While we recognize the rule contended for by the Government, we believe that it has no application to a situation such as exists in this case where it appears that the main purpose of the unlawful association between appellant and Tenner had been accomplished at least two months before the acts and statements embraced in Counts Three to Six occurred, and in which Tenner, alone, participated.

The judgments of conviction of appellant on Counts One and Two are, and each of them is, affirmed. The judgments of conviction of appellant on Counts Three, Four, Five and Six are, and each of them is, reversed. The cause is remanded to the District Court with instructions to vacate and set aside the sentences imposed upon appellant on said last mentioned Counts, and to order the dismissal of said Counts as to the appellant.

APPENDIX "D".

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

Aug. 6, 1965

Burton Marks, Esq.
Attorney at Law
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 19513—Battaglia v. USA was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

APPENDIX "E".

Constitutional Provisions and Statues Involved.

The defendants were convicted under §§ 2 and 1343, Title 18, U.S.C. §2 provides as follows:

"PRINCIPALS (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

§1343 provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures of sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000.00 or imprisoned not more than five years, or both."

FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, * * *

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law, * * *.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In all criminal prosecution, the accused shall enjoy the right * * * to have the assistance of Counsel for his defense.

Title 18, §3500, U.S.C.

§3500. Demand for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the

United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order to be delivered directly to the defendandt for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The Term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Escobedo v. *Illinois*, 378 U.S. 478 7

Goldman v. *United States*, 316 U.S. 129 9

Lopez v. *United States*, 373 U.S. 427 6

Massiah v. *United States*, 377 U.S. 201 7

Michelson v. *United States*, 335 U.S. 469 10

Needelman v. *United States*, 261 F. 2d 802, certiorari dismissed as improvidently granted, 362 U.S. 600 9

Vinyard v. *United States*, 335 F. 2d 176, certiorari denied, 379 U.S. 930 7

Statute:

18 U.S.C. 3500 9

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 534

JOHN BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C4–13; 1 R. 144–151)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1965 (Pet. App. A1–2; 1 R. 152). A petition for rehearing *en banc* was denied on August 6, 1965 (1 R. 163). The petition for a writ of certiorari was filed on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R.", preceded by volume number, designates the five-volume record on file with the Clerk of this Court.

QUESTIONS PRESENTED

1. Whether testimony of a recorded conversation between petitioner and the victims of his scheme to defraud was admissible into evidence.

2. Whether petitioner was prejudiced by the impeachment of a codefendant through the use of a portion of the codefendant's grand jury testimony.

3. Whether petitioner was prejudiced by the denial of inspection of a partial written transcript of a recording of a conversation, where defense counsel had twice heard the actual recording.

4. Whether the reversal of petitioner's conviction on certain counts required reversal on all counts.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on each count of a six-count indictment charging that he and one Harold Tenner used interstate wires in a scheme to defraud Dr. John Kenneth Warrens (1 R. 2–9; 5 R. 819–821). Petitioner was originally sentenced to a total of twenty years' imprisonment (1 R. 127–129) but, because of the reversal of several counts by the court of appeals, his sentence was reduced to ten years, five years on count one and five years on count two (1 R. 151).[1]

1. The government's evidence on count one and two—the sufficiency of which is not in dispute—

[1] Harold Tenner was convicted on each of the six counts (5 R. 820–821) and was sentenced to a total of six months' imprisonment to be followed by five-years' probation (1 R. 127). He did not appeal his conviction.

showed that in January, 1963, petitioner told Dr. John Warrens, a San Diego dentist, that, by virtue of his contacts at a bookmaking establishment in Las Vegas and at a local track petitioner could make winning bets on horse races after they had been run (2 R. 31–33). Warrens agreed to participate in the scheme and gave petitioner $5,000. Petitioner later told Warrens that he had deposited the money with an employee of a Las Vegas bookmaker, whom he identified as "Harry Mellon" (in reality, codefendant Harold Tenner (3 R. 265–270; 4 R. 534, 564; 5 R. 614, 616)) who would telephone Warrens to confirm the deposits (2 R. 34). A few days later, Tenner, using the name "Mellon," telephoned Warrens from Las Vegas, verified the deposit, and instructed Warrens that, when he was ready to place a bet, he should call a certain telephone number in Las Vegas and request the girl who answered to have "Harry Mellon" call "J.W.S." as soon as possible (2 R. 34–35).[4]

Petitioner told Warrens that a bet would be placed on February 5, 1963 and that Warrens should arrange to have two unoccupied public telephone booths available "side by side"—one to receive petitioner's telephonic information identifying the horse to bet on and another to telephone that information to the Las Vegas contact (2 R. 36–38). On February 5, petitioner telephoned Warrens and gave him the betting information (2 R. 38). Warrens immediately telephoned Las Vegas, and when "Mellon" returned the

[4] This telephone number was actually that of the answering service of the T & B Sales Company in Las Vegas, a business owned by Tenner (4 R. 490–492, 539–544; 5 R. 623–624).

call, he placed the bet (2 R. 35–39). The next morning, petitioner telephoned Warrens and told him the wager had been lost because Warrens had misunderstood his betting directions (2 R. 40).

Later that month, petitioner notified Warrens that his contact at the track would be willing to cooperate "only once more," but that this time they should increase the bet to insure recovery of their previous losses (2 R. 41–42). Warrens gave petitioner $14,000 as his investment in the wager (2 R. 41–43, 46, 47). On March 11, 1963, petitioner and Warrens located two public phone booths, side by side (2 R. 44). Petitioner entered one, and purportedly telephoned his race track contact, and Warrens used the other to telephone Las Vegas. While Warrens had "Mellon" on the telephone (2 R. 44–45), petitioner, carrying a piece of paper with horses and race numbers listed on it, pointed to horse number 7, "Arrow something." Warrens conveyed this information to Mellon and told him to place a bet of $20,000 (2 R. 46). About fifteen minutes later, "Mellon" telephoned again and told Warrens that "the horse came in out of the money" and then "Hung up" (2 R. 48). Petitioner, on being told of this development, made a telephone call and related to Warrens that he had telephoned "Mellon" and told him that "he had to do something to make this good" (2 R. 48–49).

A day or two later, petitioner told Warrens that the only way that he could get "Mellon" to agree to change the bet to a winning horse was to put up another $10,000, thus raising the bet to $30,000, with

"Mellon" sharing in the proceeds of their winnings (2 R. 49). Warrens contacted a friend (Dave Williams), explained that there had been a "mixup" on a bet and that he needed money for a short time to make an additional deposit so that the bet would be honored (2 R. 50–52). By prearrangement, Williams delivered $9,000 of his own money to petitioner (3 R. 305–313). On a number of occasions in the next few days both petitioner and "Mellon" telephoned Warrens, putting him off in regard to this additional money and the bet (2 R. 56–60).

2. After Williams had learned the nature of Warrens' prior dealings with petitioner, he persuaded Warrens to go to the San Diego police on March 22 (2 R. 62). On learning that Warrens had an appointment with petitioner that afternoon, the police equipped him with a small electronic transmitter (concealed in his inner coat pocket) which would broadcast to receiving and recording equipment to be installed in a police truck stationed nearby (2 R. 62–64, 76–77). Williams also attended the meeting. Warrens, Williams and Sergeant Thompson (who had received and recorded the conversation (2 R. 67, 77)) testified to what occurred.[4] Petitioner acknowledged receipt of the $9,000 and of the other monies previously given to him by Warrens and explained that he and Warrens had been involved in a "past-posting scheme." He said that he had utilized his contacts in further-

[4] The recording itself was not admitted because the judge believed some of the conversation to be irrelevant and prejudicial (3 R. 392; 5 R. 651, 661, 805).

ance of these arrangements, and that he hoped to get the money back. When Williams indicated that he had doubts that a bet had ever been made and that he intended to go to Las Vegas to investigate, petitioner refused to divulge the names of his contacts and attempted to dissuade Williams from making the trip (2 R. 88–92; 3 R. 280–284, 318–326).

During the two weeks following March 22, petitioner telephoned Warrens on numerous occasions and assured him that he had spoken to "Mellon" and was trying to get the money back (2 R. 87). At no time, however, was any of the money returned (2 R. 92, 114).

ARGUMENT

1. There is no merit to petitioner's contention that it was error to permit Sergeant Thompson to testify to the March 22 conversation among petitioner, Warrens, and Williams, which the sergeant overheard by means of a transmitting device carried by Warrens.[5] The admissibility of such testimony was established by *Lopez* v. *United States*, 373 U.S. 427.[6] Petitioner, moreover, did not interpose an objection to this testi-

[5] Although petitioner states otherwise (Pet. 3, 7, 17), the record shows that the tape recording of the conversation was neither played before the jury nor introduced into evidence (See 3 R. 392; 5 R. 651, 666, 805).

[6] We note that, as in *Lopez*, the testimony here of the conversation as overheard through the transmitting device was not the exclusive testimony offered regarding the conversation but was in addition to the testimony of Warrens and Williams, who participated in the interview with petitioner. See the concurring opinion of the Chief Justice in *Lopez*, 373 U.S. at 441–446.

mony at trial based upon the means by which Sergeant Thompson overheard the conversation.

The assertion (Pet. 14–17) that testimony as to the conversation was inadmissible because counsel was not present at the meeting between petitioner, Warrens, and Williams is frivolous. The conversation did not occur after the return of an indictment, as in *Massiah* v. *United States*, 377 U.S. 201, or after arrest, as in *Escobedo* v. *Illinois*, 378 U.S. 478. On the contrary, the conversation took place in petitioner's motel room at the first stage of police investigation of the case following the complaint made by Warrens and Williams. The criminal scheme was, moreover, still unfolding. During the two-week period following the meeting at the motel room where the conversation took place petitioner telephoned Warrens "numerous times" concerning the bets to "reassure" him that he had spoken to "Mellon" and that things would be all right (2 R. 87–88). The Constitution does not require that a defendant be permitted to confer with counsel while he is participating in criminal conduct. See *Vinyard* v. *United States*, 335 F. 2d 176, 184 (C.A. 8), certiorari denied, 379 U.S. 930.

2. Codefendant Tenner took the stand in his own behalf and admitted that he had used the name "Henry Mellon" and that he had had a telephone answering service in Las Vegas (5 R. 613). Tenner's testimony was impeached by reference to his contrary grand jury testimony (5 R. 631–637). Before testifying before the grand jury, Tenner had been advised that he was under oath and that he was subject to

prosecution if he testified falsely. It had also been determined that he knew of his privilege against self-incrimination. The United States Attorney who conducted the grand jury inquiry had, in addition, communicated with an attorney representing Tenner prior to his grand jury appearance (5 R. 642, 646–647, 667–668).

There was therefore no violation of Tenner's rights before the grand jury. Petitioner would not, in any event, have standing to complain of any such violation. In addition, the grand jury testimony did not affect petitioner's case, since the inconsistent answers related exclusively to Tenner's credibility and participation in the scheme. The trial court made clear in its instructions that any impeachment through prior inconsistent testimony should be considered only in determining the weight to be given to the testimony of the particular witness involved (5 R. 807–808).

3. After Williams testified for the government as to the contents of his conversation with petitioner and Warrens (3 R. 318–326), he stated, on cross-examination, that, on the day before his testimony, he had read a partial memorandum prepared from the tape recording of the conversation to refresh his recollection (3 R. 329, 331). The trial court denied the defense motion to have the government produce this document for use on cross-examination of the witness on the ground that the defense "had an opportunity on two occasions to hear the tape recording in full" (3 R. 330). The record corroborates that, shortly

before and during the trial, defense counsel was permitted to hear the recording in full (2 R. 4–9, 67–69). While it is not entirely clear, the record also suggests that, at the outset of the trial, defense counsel had in fact been given an opportunity to examine the memorandum (2 R. 7–b).

The memorandum sought by the defense was not a "statement" of government witness Williams producible under 18 U.S.C. 3500, since it was a partial record of the meeting, reproduced at a later date, and was never "signed or otherwise adopted or approved by" Williams. See 18 U.S.C. 3500(e) (1) (2). The only material in the government's possession which could qualify as Williams' "statement" regarding the conversation was the tape recording itself. Since defense counsel heard this recording on two separate occasions, the trial judge properly ruled that he had obtained the only statement that the defense might be entitled to under 18 U.S.C. 3500.

Nor was production of the memorandum required under the special rule dealing with material used by a witness to refresh recollection. Williams did not use the memorandum at trial, but referred to it the day before his testimony. Its production was therefore a matter within the sound discretion of the trial judge. *Goldman* v. *United States,* 316 U.S. 129, 132; *Needelman* v. *United States,* 261 F. 2d 802, 806 (C.A. 5), certiorari dismissed as improvidently granted, 362 U.S. 600. Since three separate accounts of the conversation were offered by the government at the trial, and since the actual tape recording was made avail-

able to the defense, the court did not abuse its discretion in light of the danger of injecting confusing collateral issues into the case through cross-examination of Williams on the basis of this partial transcript. Cf. *Michelson* v. *United States*, 335 U.S. 469, 480.

4. The court of appeals reversed petitioner's conviction on counts 3-6 on the ground that there was no showing that petitioner was connected with telephone calls made by Tenner to Warrens in May and June, 1963, a considerable period after the events on which counts one and two were based (1 R. 151). Such reversal obviously did not require reversal as to counts one and two. The government's proof clearly segregated counts one and two, in which petitioner was overtly and directly involved, from the remaining counts which dealt with the overt activities of only defendant Tenner. Any possibility of prejudice was removed by the trial court's explicit instructions to the jury (5 R. 813) that

> Each offense and the evidence applicable thereto should be considered separately. The fact that you may find both or one of the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.'

'Petitioner sets forth as a "Question Presented" (Pet. 4) but does not argue that government counsel's reference in closing argument to him as "Johnny B," was unfair comment which denied him "a fair trial and due process" (Pet. 4). The complete answer is that a government witness had in fact testified he had known petitioner as "Johnny B" (4 R. 550-551). Government counsel's statement to that effect was therefore a fair reference to the evidence (See 5 R. 725, 779; see also 2 R. 28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 534

JOHN L. BATTAGLIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition of John L. Battaglia, for Rehearing of Decision Denying Certiorari to the Ninth Circuit Court of Appeals.

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Grounds of petition for rehearing	3
(1) Tenner's Grand Jury testimony violated Fifth and Sixth Amendments	3
(2) Petitioner Battaglia raised the constitutional objection in the courts below	4
(3) Government contended and Circuit Court ruled that petitioner could not raise Tenner's constitutional rights	6
Argument	8
Point I. In a joint trial, nonconfessing co-defendant may raise constitutional objection as to confession	8
Point II. Fact that tainted testimony was offered for impeachment is immaterial	10
Point III. Petitioner was actually prejudiced by the tainted testimony	13
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases — Page

Delli Paoli v. U.S., 352 U.S. 232, 77 S. Ct. 294 11

Escobedo v. U.S., 378 U.S. 478, 84 S. Ct. 1758 ....3, 11

Fahy v. Connecticut, 375 U.S. 85, 84 S. Ct. 229 14

Massiah v. U.S., 377 U.S. 201, 84 S. Ct. 1199 ....3, 11

People v. Aranda, 63 A.C. 542 .....2, 7, 8, 11, 15

Miscellaneous

Time Magazine, December 24, 1965, p. 31 .....2, 7

Rules

Rules of the Supreme Court, Rule 58 .....1, 2, 7, 15

Statutes

United States Code, Title 18, Sec. 1343 1

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Fifth Amendment .....
.....2, 3, 5, 14, 15

United States Constitution, Sixth Amendment .....
.....2, 3, 5, 14, 15

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Petition of John L. Battaglia, for Rehearing of Decision Denying Certiorari to the Ninth Circuit Court of Appeals.

To the Honorable Chief Justice, and to the Honorable Associate Justices of the United States Supreme Court:

John L. Battaglia, appellant and petitioner herein, respectfully petitions the court for a rehearing of his Petition for Certiorari, pursuant to Rule 58, upon the grounds stated herein.

Opinions Below.

The opinion of the Court of Appeals is not yet reported, but it is contained in petitioner's Petition for Certiorari. No opinion was filed on the denial of certiorari. Petitioner stands convicted of violating Title 18 U.S.C., Section 1343 (fraud) and is presently under a sentence of ten years imposed thereon.

Jurisdiction.

The Petition for Certiorari was filed on September 3, 1965, pursuant to 28 U.S.C. 1254(1), and was denied on December 13, 1965. This Petition for Rehearing is filed pursuant to Supreme Court Rule 58, and upon the Certificate of Counsel attached.

Question Presented.

(a) The petition herein presents the basic question whether a co-defendant in a joint trial (Battaglia) has the standing to question the deprival of the constitutional rights of the other co-defendant (Tenner) regarding testimony coerced from Tenner without counsel before the grand jury, in violation of the Fifth and Sixth Amendments, U. S. Constitution.

The recent decision of the Supreme Court of California, *People v. Aranda* (November 12, 1965), 63 A.C. 542, by Chief Justice Rodger Traynor, holds that the nonconfessing co-defendant may raise the objection as to the deprival of the constitutional rights of the confessing co-defendant. See comment, Time Magazine, December 24, 1965, page 31, attached hereto as Exhibit A.

(b) A secondary question is also presented, whether the use of the grand jury testimony of the co-defendant Tenner secured in violation of the Fifth and Sixth Amendments, U.S. Constitution, constitutes reversible error, where the tainted grand jury testimony was assertedly used for impeachment of Tenner's trial testimony.

The Second Circuit recently ruled adversely to petitioner on this point, see *Curry v. U.S.* (December 23, 1965). The point is ripe for consideration by the U.S. Supreme Court, thus commending favorable action for a rehearing of the original Petition For Certiorari to resolve these important principles of constitutional law.

GROUNDS OF PETITION FOR REHEARING.

(1) Tenner's Grand Jury Testimony Violated Fifth and Sixth Amendments.

The grand jury testimony of co-defendant Tenner, was secured in violation of Tenner's constitutional rights. At the time he was called as a witness before the grand jury, Tenner did not know that he was a potential defendant, and did not have an attorney at the time. No warning regarding his right to counsel, and no provision for counsel was accorded him, all in violation of the Fifth and Sixth Amendments, U.S. Constitution, see Reporter's Transcript page, 643, and pages 631-636, and 639.

His testimony was hesitant and evasive, and he refused to answer a number of questions on the basis of self-incrimination. The proceedings were conducted in an atmosphere of coercion.

See *Massiah v. U.S.* (1964), 377 U.S. 201, 84 S. Ct. 1199; and *Escobedo v. U.S.* (1964), 378 U.S. 478, 84 S. Ct. 1758, condemning use of confessions secured without counsel in violation of the Sixth Amendment. The rule is applicable to the instant Tenner grand jury proceedings conducted without counsel. While Tenner refused some answers as self-incriminatory, he was sadly in need of counsel [Rep. Tr. pp. 631-636]. Hence, the entire grand jury proceeding was tainted, and the Tenner testimony could not be constitutionally used for any purpose.

(2) Petitioner Battaglia Raised the Constitutional Objection in the Courts Below.

During the trial of the cause, petitioner objected to the Tenner grand jury testimony stating, "because we feel it is highly prejudicial to the other defendant (petitioner) under the circumstances," [Rep. Tr. p. 632].

Petitioner thereafter twice moved to strike the Tenner grand jury testimony "because he was not informed he was a potential defendant and he was not represented by counsel" [Rep. Tr. pp. 645, 678], which motions were denied by the trial court. The matter of the Fifth Amendment was discussed by counsel [Rep. Tr. pp. 647 and 678].

Petitioner on appeal, Appellant's Opening Brief, page 49, presented the point as follows:

> "VII
>
> THE COURT ERRED IN PERMITTING PORTIONS OF THE TRANSCRIPT OF THE TESTIMONY OF HAROLD TENNER BEFORE THE GRAND JURY ON OCTOBER 30, 1963, TO BE READ TO THE JURY IN THIS CASE AND IN DENYING THE MOTION TO STRIKE THE SAME.
>
> At the close of the Government's case in chief the defendant Harold Tenner took the stand to testify for the defense. Some of the testimony given by him was in conflict with his testimony before the Grand Jury on October 31, 1963, and on cross-examination over the strenuous objections of counsel for Battaglia, the Government attorney was per-

mitted to read portions of the Grand Jury transcript to impeach Tenner. [RT. 631-636, 639, 642] This was highly prejudicial to the defendant Battaglia as well as to the defendant Tenner, and the court erred seriously in permitting the same to be read. The court further erred in permitting the defendant Tenner to be examined as to statements made by him before the Grand Jury.

On cross-examination by attorney Abeles, Tenner testified that he was not represented by an attorney before the Grand Jury, nor did he consult with an attorney prior to going before the Grand Jury. Not only was the testimony of Tenner before the Grand Jury read over objections of counsel, but a motion to strike such testimony made by counsel for both defendants to strike that testimony was denied [RT. 667-668].

That the admission of such testimony and the denial of the motion to strike were erroneous is clearly established by the cases of *Massiah v. U.S.* and *Escobedo v Illinois,* supra., as well as in the very recent case of *People v Dorado,* 62 AC. (Cal) 350. The constitutional rights of Tenner, as well as Battaglia, were clearly violated under the *Fifth and Sixth Amendments of the United States Constitution* and the violation of such rights constituted reversible error."

Petitioner in his Petition for Certiorari, argued the right of petitioner to object to the Tenner grand jury testimony on the basis of the Fifth and Sixth Amendments, U.S. Constitution, see Petition for Certiorari, Point III, at page 20. Hence, the point has been preserved, and is now properly before the court.

(3) Government Contended and Circuit Court Ruled That Petitioner Could Not Raise Tenner's Constitutional Rights.

The government before the Ninth Circuit, contended that petitioner had no right to object. At page 49, Appellee's Brief, the government contended, "It is fundamental that one needs standing to raise a constitutional issue . . . No constitutional right guaranteed to Battaglia has been shown to have been violated."

The Ninth Circuit Court in the opinion below upheld the foregoing contention, as follows:

> "Appellant contends that Tenner's constitutional rights were violated because Tenner testified that he was not represented by an attorney before the Grand Jury nor did he consult with an attorney prior to going before the Grand Jury. Appellant relies upon Massiah v. United States, supra, and Escobedo v. Illinois, supra. We see no violation of appellant's constitutional rights in connection with the efforts of the Government to impeach the credibility of Tenner."

The government thereafter reasserted its earlier contention in opposing Certiorari in this court, see Brief for the United States in Opposition, page 8, as follows: "There was therefore no violation of Tenner's rights before the grand jury. *Petitioner would not, in any event, have standing to complain of any such violation.*"

We conclude that the grounds for rehearing are properly before the court on this Petition for Rehearing. The

California Supreme Court opinion of *People v. Aranda,* has attracted national attention on the precise point involved, see Time Magazine, December 24, 1965, page 31. This intervening circumstance occurred after the denial of Certiorari, and are of substantial and controlling effect, within the operation of Rule 58. The *California Aranda* ruling is in opposition to the denial of Certiorari herein. The conflict should be resolved. Further, necessity for granting a rehearing arises from the December 23, 1965 decision filed by the Second Circuit, *Curry v. U.S.,* on the use of unconstitutional tainted evidence by way of impeachment. While this ruling is adverse to petitioner, nevertheless the subject of joint trials, confessions, and witness impeachment is ripe for consideration and should be adjudicated at this time. These intervening circumstances fulfill the requirements of Rule 58 for a rehearing.

ARGUMENT.

POINT I.

In a Joint Trial, Nonconfessing Co-Defendant May Raise Constitutional Objection as to Confession.

According to *People v. Aranda* (November 12, 1965), 63 A.C. 542 at 551, petitioner herein may object to the tainted confession of a co-defendant. The same rule would apply to the use of tainted testimony before the grand jury, for the constitutional principle is the same.

The best and latest argument on the subject is made by California's brilliant Chief Justice Roger Traynor in said *People v. Aranda* (November 12, 1965), 63 A.C. 542 at 550, as follows:

> "Whether or not these criticisms of the present rule (admission of confessions in joint-trials) require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them.[4] *When, however, the confession implicating both defendants is not admissible at all, there is no longer*

---

[4]In this compromise the defendant must bear the risk that regardless of its efforts, the jury may subconsciously merge all the evidence. "A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and liability of the jury to separate the sheep from the goats." (United States v. Fradkin, (2d Cir.) 81 F. 2d 56, 59.)

room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968-969; People v. Donovan, 13 N.Y.2d 148, 151 [243 N.Y.S.2d 841 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S.2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [63 N.E. 2d 77] with Malinski v. New York, 324 U.S. 401, 410-412.) The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him (see People v. Parham, 60 Cal.2d 378, 385) preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant.

In the present case, however, it is reasonably probable that a result more favorable to Aranda would have been reached had Martinez's confession been excluded. The error therefore resulted in a miscarriage of justice. (Cal. Const., art. VI, §4½; People v. Watson, 46 Cal.2d 818, 836.) There was a direct conflict in the evidence, and both defendants denied their guilt. In his argument to the jury, the prosecutor linked the cases of the two defendants together and in effect urged Martinez's confession as evidence against Aranda.

Since the judgments must be reversed, we consider other questions that may arise on retrial."

POINT II.

Fact That Tainted Testimony Was Offered for Impeachment Is Immaterial.

Where the grand jury testimony is tainted, it may not be used at all. The evidence is either pure or soiled, black or white, clear or dirty. This is especially so as against the nontestifying co-defendant. Petitioner did not testify before the grand jury or the trial court, and was prejudiced by the tainted testimony. While possibly the "mud pie" was not directly thrown at petitioner, yet it was he who was splashed, and it was petitioner whose fate was sealed by its effect. In the end, Tenner received a six-month sentence, and it is petitioner who presently is burdened with the ten-year sentence. His trial should not only have been fair—it should also appear to be fair.

The Second Circuit, *Curry v. U.S.* decided December 23, 1965, has ruled to the contrary on the impeachment issue. The Los Angeles Daily Journal, under date of January 4, 1965, carried the following news release on the decision, as follows:

> "NEW YORK (ACCN) — A confession which has been suppressed before trial on the ground it was illegally obtained can nevertheless be used at the trial to prove, not that the defendant is guilty, but that he told police a different story than that he recited on the witness stand—thus attacking his credibility—the U. S. Court of Appeals for the Second Circuit held in an opinion here, December 23.

> The opinion, written by Chief Judge J. Edward Lumbard and concurred in by Judges Leonard P. Moore and Paul R. Hays, also held that the confession in question had not in fact been illegally obtained, but this was irrelevant to the main point about the use of the confession to impeach the credibility of the defendant. The principle thus formulated will apply as precedent in future Second Circuit cases and perhaps in other federal (and state) courts in the U. S. *unless at some future time reversed by the U. S. Supreme Court.*"

The identical impeachment argument was advanced by the government in the Circuit Court, see Appellee's Brief, pages 49 to 52. The contention conflicts with the basic principle of *Messiah* and *Escobedo.* Where the prosecution tactics have become tainted, so have become the fruit. There can be no compromise on this fundamental constitutional principle. It offends the dignity of a great nation to so resort to "grey evidence" to convict.

The following from Chief Justice Traynor, *People v. Aranda* (November 12, 1965), 63 A.C. 542, quoting from Justice Frankfurter, in *Delli Paoli v. U.S.*, 352 U.S. 232, 77 S. Ct. 294, is on point as to the detrimental effect it has upon the administration of Justice to so prejudice the jury. Chief Justice Traynor states:

> " 'The admonition becomes a futile collocation of words and fails of its purpose as a legal pro-

tection to defendants against whom such a declaration should not tell. . . . The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247.) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead, it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' towards juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956), p. 105.)"

The instruction to the jury [Rep. Tr. p. 804, line 21], did not cure the error, or wipe the prejudice from the mind of the jury, wherein the trial court instructed:

"Otherwise any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made."

POINT III.

Petitioner Was Actually Prejudiced by the Tainted Testimony.

The prosecution contended that petitioner as John Bender, and Tenner posing as Harry Morgan, duped the victim Dr. Warren into placing so called past post horse racing bets. That Tenner had originally denied the identity of Harry Morgan, and the making of the telephone calls and wagers went directly to the issue of guilt of petitioner. The Assistant United States Attorney Mr. Farber pointed up this contention to the court [Rep. Tr. p. 636], as follows:

> "Mr. Farber: We believe that the name 'Mellon' is important in this case, because of the posture that the case is or has taken. There is evidence and a statement from one of the defendants, that is defendant Tenner, that he never told Mr. Battaglia that he was Mellon, yet we have this conversation between Dr. Warrens and Mr. Battaglia pertaining to Mellon.
>
> This is a circumstantial step proving or going, one, to the truth of Mr. Tenner's statement, and it also further goes to the question of whether or not during the term of the scheme itself Mr. Battaglia and Dr. Warrens had not considered a man named Mellon as their contact."

The government contended that petitioner had given Dr. Warren the false name of Harry Morgan, and also his telephone number [Rep. Tr. p. 701] and the prosecution argued at Reporter's Transcript page 715:

> "He (petitioner) surely knew Harry Mellon, and if we are to believe any part of the story of Mr.

> Tenner, we are to believe that he was Harry Mellon, and of course, there is much other evidence in the record concerning that fact. Mr. Battaglia knew who Mellon was and Mr. Tenner knew who Battaglia was, and he knew who Dr. Warrens was, and they both knew about the past-posting scheme, the scheme to defraud, to defraud Dr. Warrens."

What petitioner said on the tape recording in evidence concerning Harry Morgan was also argued [Rep. Tr. p. 724, line 18]. The prosecution argued at length concerning the connection between Harry Morgan and petitioner [Rep. Tr. p. 767, line 16, and p. 781, line 15].

It follows that petitioner was irretrievably prejudiced by the tainted grand jury testimony, if prejudice in fact must be shown to vindicate the denial of rights under the Fifth and Sixth Amendments, U.S. Constitution, see *Fahy v. Connecticut* (1965), 375 U.S. 85, 84 S. Ct. 229.

Conclusion.

The grand jury testimony of co-defendant Tenner was tainted, because the proceedings were held in an atmosphere of hostility and coercion, and without counsel. Tenner did not know that he was the accused, and the government did not so inform him, and deliberately concealed that fact, even though the case had been fully investigated. The Sovereign employed the grand jury proceedings as a trap to insure conviction.

It is credulous to say that the grand jury testimony was offered solely to impeach Tenner, the nominal co-defendant. The prosecutor knew that once the "poison" was out, that petitioner's conviction was secure. Peti-

tioner was in fact convicted when the jury learned that Tenner had originally denied the Harry Morgan identity, wagers and the telephone calls before the grand jury.

It is equally credulous to contend that anything the trial court said in the instructions, could have possibly cured the prejudicial effect of the tainted testimony. Whether the jurors were "low grade morons" or "superhuman", the "poison" was out, and by use of the unconstitutional grand jury testimony, the conviction was secured. Thus the constitution was offended in this case.

The Fifth Amendment (due process) and the Sixth Amendment (right to counsel), mean exactly what they say. It is not a matter of semantics, but it involves the basic liberty and freedom of our people. The time has come for this court to resolve this important and far-reaching rule of criminal law involved in this Petition. The *California-Aranda* decision nationally publicized by Time Magazine, and *Curry v. U.S.*, nationally carried on the wire services, each point up the national interest in the questions presented by this petition. These recent happenings furnishes the "intervening circumstances of substantial and controlling effect," required by Rule 58 for favorable action.

The Petition for Rehearing of the Petition for Certiorari should be granted, and the matter should be set down for argument on the merits.

Respectfully submitted,

CARYL WARNER,
Attorney for Petitioner.

Certificate.

I do hereby certify that the foregoing Petition for Rehearing filed pursuant to Rule 58, is presented in good faith and not for delay, and that in my opinion, the ruling of December 13, 1965, denying certiorari conflicts with *People v. Aranda* (California, November 12, 1965), in which the undersigned served as Aranda's appointed attorney, and further, that the use of tainted testimony for impeachment, as pointed up by the Second Circuit decision of December 23, 1965, *Curry v. U.S.*, along with *People v. Aranda* have created national interest and importance to the questions presented, which questions should be resolved at once. I further certify that the within Petition for Rehearing is restricted to the grounds stated, to wit: that one co-defendant may urge the denial of constitutional rights of the other co-defendant, wherein a confession or grand jury testimony is secured in violation of the Fifth and Sixth Amendments, U.S. Constitution, and that the tainted testimony may not be used by the government, either in the case in chief, or thereafter as impeachment, or at all, and that *Delli Paoli v. U.S.* (1957), 352 U.S. 232, 77 S. Ct. 294, should be re-examined, reversed, and the Justice Frankfurter opinion be adopted, and that the opinion of California Chief Justice Roger Traynor in *People v. Aranda* should be adopted as the law of the land, the foregoing being the basis of this Certificate.

Dated at Los Angeles, California, this 5th day of January, 1966.

CARYL WARNER,
Attorney for Petitioner.

THE LAW

THE SUPREME COURT

Voluntary Prayer?

At milk-and-cookies time each morning, the kindergarten pupils of New York City's P.S. 184 recited a childish grace: "God is great, God is good, and we thank him for our food. Amen." Each afternoon they prayed:

Thank you for the world so sweet,
Thank you for the food we eat,
Thank you for the birds that sing—
Thank you, God, for everything.

In 1962, Principal Elihu Oshinsky stopped the prayers in keeping with the Supreme Court's decisions against compulsory religious exercises in public schools. Appalled, 15 parents—Protestant, Catholic and Jewish—organized PRAY (Prayer Rights for American Youth) and sued in federal court, claiming that their tots had a constitutional right to "voluntary" school expression of "their love and affection for Almighty God."

Voluntary? Not quite, countered Principal Oshinsky. The teachers taught those five-year-olds to say those prayers, which means, he said, official coercion, however benign. When the case reached the U.S. Court of Appeals for the Second Circuit, it avoided the voluntary question by ruling simply that the First Amendment does not compel a state to let citizens pray in a state-owned facility whenever they wish to do so. Judge Henry J. Friendly told PRAY: "The plaintiffs must content themselves with having their children say these prayers before 9 a.m. and after 3 p.m."

Last week the Supreme Court silently refused to review PRAY's appeal from Judge Friendly's decision. Though it signifies neither approval nor disapproval, the court's action suggests that it has no intention of reconsidering its original prayer decisions—a move for which PRAY's "voluntary" argument might have opened the way. As a result, the only prayers still permissible in U.S. public schools are those that a student says to himself.

FUGITIVES

Monstrous Mackerel

For 32 months, Harlem's Democratic Congressman Adam Clayton Powell has taxed more than 70 judges with his legal evasions of a $46,500 defamation judgment won by Mrs. Esther James, a widow whom Powell slandered on TV as a "bag woman" for gambling payoffs. Last week acting New York State Supreme Court Justice Maurice Wahl rewarded Powell's "monstrous defiance of the law" by awarding Mrs. James the whopping sum of $575,000.

A year ago, Mrs. James charged that Powell evaded attachment for the judgment by fraudulently transferring title to his $50,000 house in Puerto Rico to his wife's aunt and uncle. Twice, Powell ignored fact-finding trials. Last week, forced to assume that the charge was true, Justice Wahl ordered Powell to pay Mrs. James $75,000 in compensatory and $500,000 in punitive damages. Summing up his opinion of Powell, Justice Wahl indignantly paraphrased a famous insult attributed to Virginia's 19th century Senator John Randolph: "He is a man of splendid abilities, but he shines and stinks like rotten mackerel by moonlight."

CRIMINAL JUSTICE

Another Confession Problem: Unjoining the Joint Trial

As if the continuing U.S. confession controversy were not complicated enough, now the custom of joint trials has surfaced to compound the confusion. When a crime involves more than one defendant, most prosecutors aim to try them together; indeed, joint trials have occurred in many of the most famous U.S. criminal cases. But what if one defendant's confession implicates another? Is the use of such evidence so unfair to a man who has not confessed that it must be excluded?

The question arises because of a jewelry-store holdup in Los Angeles, after which the police arrested Henry Martinez and his alleged accomplice, John Aranda. At their joint trial, a policeman testified that Martinez had confessed, implicating Aranda. The judge followed a common practice: he ruled Martinez's confession admissible, but warned the jury not to consider it as evidence against Aranda. Not surprisingly, however, the jury found both men guilty of first-degree robbery.

Acting under its broad new confession doctrine (*People* v. *Dorado*), the California Supreme Court has voided Martinez's confession on the ground that the police failed to warn him of his rights to silence and to counsel as soon as they had other solid evidence against him—his fingerprints at the scene of the crime. In effect, that reversal also destroyed the case against Aranda—and spurred the court to confront the whole problem of how confessions should be handled in joint trials.

Brainwiping. In 1957 the U.S. Supreme Court ruled by a vote of 5 to 4 that federal juries could be trusted to follow judges' instructions and compartmentalize the evidence against codefendants, because otherwise "the jury system does not make sense." But in that decision (*Delli Paoli* v. *U.S.*), the four dissenters argued, in the words of Justice Felix Frankfurter, that whatever is said in joint trials "cannot be wiped from the brains of the jurors." And this year the court seemed to lean toward the Frankfurter attitude as it struck down a similar kind of mental gymnastics: the old custom of asking the same jury to determine both the validity of a confession and the confessor's guilt or innocence. Even if the confession proves to have been coerced, how can a jury ignore what it says? In *Jackson* v. *Denno*, the court ruled that the judge must determine a confession's voluntariness before the jury may hear it (TIME, Jan. 22).

Speaking for the California court in the Martinez-Aranda case, Chief Justice Roger Traynor took his cue from *Jackson* and reversed Aranda's conviction on the ground that a jury cannot "segregate evidence into separate intellectual boxes." In short, said Traynor, if A confesses that he committed criminal acts with B, the jury cannot "effectively ignore the inevitable conclusion

Down with mental gymnastics.

that B has committed those same criminal acts with A." From now on, ruled Traynor, California courts must handle codefendant confessions according to new procedures:

▶ Confessions are permissible in joint trials if all incriminating references to other defendants are "effectively deleted" from the confession in question. In Aranda's case, it would have sufficed merely to delete his name from Martinez's confession because the confession contained no other clue to his identity.

▶ When one defendant's confession so completely involves another defendant that "effective" deletion is impossible, the judge may grant a defense motion for separate trials. If the defense motion is not granted, the confession must be excluded at the joint trial.

California's decisive attack on joint trials is sure to alarm those prosecutors for whom the practice has been a standard tactic. But Chief Justice Traynor says that rules similar to California's have already proved workable in Ohio, Illinois and Connecticut. Whether the U.S. Constitution requires them for all states is a question for the U.S. Supreme Court.

EXHIBIT A